Supreme Court, U.S.
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No. 09-1212

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

BILLY GROVES, individually, d.b.a. Savannah Re-Load,
SAVANNAH RE-LOAD, and
BRAMPTON ENTERPRISES, LLC,
d.b.a. Savannah Re-Load,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT ..	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	2
A. Brampton's Response Rejects the Eleventh Circuit's Recognition of a Conflict Among the Third, Seventh, and Eleventh Circuits	2
B. Brampton's Response Minimizes the Adverse Impact of the Eleventh Circuit's Ruling on the National Freight Rail Network	6
C. Brampton's Argument Relating to Primary Jurisdiction Fails to Address the Eleventh Circuit's Encroachment Upon the STB's Exclusive Jurisdiction Regarding Interpretation of Tariff Provisions	8
D. The Eleventh Circuit's Decision Imposes an Unclear and Unworkable Rule Upon the Interstate Rail Network	10
CONCLUSION	13

TABLE OF CITED AUTHORITIES

Page

CASES

Capitol Materials, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Company, 2004 STB LEXIS 227, STB Docket No. 42068 (STB served April 12, 2004) 9

CSX v. City of Pensacola, 936 F. Supp. 880 (N.D. Fla. 1995) 10

CSX Transp. Co. v. Novolog Bucks County, 502 F.3d 247 (3d Cir. 2007), *cert denied*, 128 S. Ct. 1240 (2008) ..... *passim*

Illinois Central R.R. v. South Tec Development Warehouse, No. 97 C 5720, 1999 U.S. Dist. LEXIS 11222 (N.D. Ill. July 16, 1999) 9

Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc., 337 F.3d 813 (7th Cir. 2003) 3, 5

Investigation of Adequacy of Freight Car Ownership, 323 I.C.C. 48 (1964) 7

Norfolk Southern Ry. Co. v. Groves, 586 F.3d 1273 (11th Cir. 2009) 3, 4, 5, 8, 11

PCI Transp., Inc. v. Fort Worth & Western R.R. Co., 418 F.3d 535 (5th Cir. 2005) 9

Cited Authorities

Page

PCI Transportation, Inc. v. Fort Worth & Western R.R. Co., 2008 STB LEXIS 218, STB Docket No. 42094 (Sub-No. 1) (STB served April 25, 2008) 9

Southern Pacific Transportation Co. v. Matson, 383 F. Supp. 154 (N.D. Cal. 1974) 10

Union Pacific v. Carry Transit, Inc., No. 3:04-CV-1095, U.S. Dist, LEXIS 45568 (N.D. Tex. 2005) 10

Western Maryland Ry. Co. v. South African Marine Corp., No. 86 CIV 2059, 1987 U.S. Dist. LEXIS 7323 (S.D.N.Y. Aug. 13, 1987) 10

STATUTES & REGULATIONS

49 U.S.C. § 10702 9

49 U.S.C. § 10743(a)(1) 2, 4

49 U.S.C. § 10746 12

Cited Authorities

Page

MISCELLANEOUS

Annual Report R-1 (line 6 of schedule 210) of Norfolk Southern railway Company, Burlington northern Santa Fe, CSX Transportation, Inc. and Union Pacific Railroad which are publicly available at: http://www.stb.dot.gov/econdata.nsf/f039526076cc0f8e8525660b006870c9?OpenView&Start=1&Count=300&Expand=2#2. Last visited July 7, 2010 6

Norfolk Southern Tariff NS 6004-B, Item 200(6) ... 8

Norfolk Southern Tariff NS 6004-B, Item 850(5) ... 8

INTRODUCTION

Petitioner, Norfolk Southern Railway Company ("Norfolk") asks this Court to resolve a split in authority created by the Eleventh Circuit's decision in this case. That decision imposes inconsistent obligations upon rail carriers and shippers depending upon the circuit in which rail cars are located. Norfolk also asks this Court to review the decision for improperly encroaching upon the exclusive jurisdiction of the Surface Transportation Board ("STB"). Finally, Norfolk seeks review from this Court because the decision constitutes a significant departure from the accepted definition of "consignee" which the STB and the industry have followed for decades.

Respondent, Brampton Enterprises, LLC ("Brampton") opposes certiorari. In its brief, Brampton attempts to reconcile directly conflicting holdings of the Third and Eleventh Circuits in an attempt to extinguish the circuit split and minimize the effect of the Eleventh Circuit's ruling on the otherwise uniform law relating to interstate rail transportation. Brampton also argues that the Eleventh Circuit's ruling faithfully applies a century of precedent despite the fact that it introduces a definition of the term "consignee" which is unprecedented. Finally, Brampton conflates the doctrines of primary and exclusive jurisdiction. This brief addresses new points raised in Brampton's brief.

ARGUMENT

A. Brampton's Response Rejects the Eleventh Circuit's Recognition of a Conflict Among the Third, Seventh, and Eleventh Circuits

Brampton curiously asserts that "there is no split of authority between the Eleventh Circuit and Third Circuit." Opposition ("Opp."), p., 9.

In *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007), *cert. denied*, 128 S.Ct. 1240 (2008), a rail carrier, CSX, delivered freight to an entity identified as the consignee of freight on bills of lading, *i.e.*, Novolog. Novolog did not own the freight[1] or consent to being identified as consignee on the bills of lading which were prepared by another entity.[2] Novolog, however, accepted delivery of the freight.[3] Prior to accepting delivery, Novolog did not provide CSX with: (1) notice that Novolog did not own the freight, (2) notice that Novolog was acting as an agent for another party, or (3) the name and address of that other party. These notice requirements are set forth in the Interstate Commerce Act at 49 U.S.C. § 10743(a)(1).

The Third Circuit held that "recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery *unless* they act as agents of another

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[1] *Novolog*, 502 F.3d at 250-251.

[2] *Id.*, at 252.

[3] *Id.*, at 250.

and comply with the notification procedures established in . . . § 10743(a)(1)." *Novolog*, 502 F.3d at 254 (emphasis added). The Third Circuit held that such entities are "presumptively responsible" for demurrage. *Id.*, at 259. The Third Circuit acknowledged that the Seventh Circuit had held that simply being identified as consignee on some bills of lading was not enough to render that named consignee liable for demurrage in the absence of "other factors." *Id.*, at 260 (*citing Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003)). The Third Circuit expressly rejected the Seventh Circuit's "designation-plus" standard and held no "other factors" were relevant to determining whether a party named as a consignee on a bill of lading was, in fact, a consignee for purposes of determining demurrage liability. *Id.*

In this case the Eleventh Circuit reached a conclusion opposite that of the Third Circuit. Here, it is undisputed that Brampton: accepted delivery of freight from Norfolk;[4] was identified as a consignee on *every* bill of lading relating to rail cars for which demurrage is sought;[5] did not own the freight;[6] did not consent to being identified as consignee on the bills of lading which were prepared by another entity;[7] and, did not provide

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[4] *Groves*, 586 F.3d at 1275.

[5] *Id.*, at 1276.

[6] The *Novolog* Court noted that "It goes without saying that Novolog's lack of ownership of the freight is immaterial, since . . . [§ 10743(a)(1)] is specifically directed at consignees 'not having beneficial title to the property.'" *Novolog*, 502 F.3d at 257, n. 10 (citation omitted).

[7] *Groves*, 586 F.3d at 1276.

Norfolk with the notice required under § 10743(a)(1) prior to accepting delivery.[8] Under these parallel circumstances, the Eleventh Circuit held that Brampton was not liable because it had not been "given notice that it has been listed as a consignee by third parties" and expressly rejected the "*Novolog* rule of presumptive liability." *Norfolk Southern v. Groves*, 586 F.3d 1273, 1280 (11th Cir. 2009).[9]

Brampton argues that *Groves* and *Novolog* do not conflict because Brampton claims that it was not given notice that it had been named as consignee on the bills of lading. Brampton argues that this factor was not discussed in *Novolog* and, thus, that "The Third Circuit's reasoning does not cover the 'lack of knowledge' situation present here." Opp., p., 10. This argument completely misses the mark. The Third Circuit did not discuss whether Novolog had notice that it was named as consignee on the bills of lading because the court held that this "other factor" is completely irrelevant to a determination of whether Novolog was a consignee for purposes of demurrage liability. The Eleventh Circuit, on the other hand, found this "other factor" to be dispositive of whether Brampton was a consignee and reached a diametrically opposed holding.

While both the Third and Eleventh Circuit agree that a consignee is liable for demurrage, the courts expressly disagree on the fundamental question of what makes an entity a consignee. Under the *Novolog* rule,

[8] *Id.*

[9] *Groves* is reproduced in the Appendix to the Petition for Writ of Certiorari at 1a-21a.

Brampton is a consignee because it is identified as a consignee on the relevant bills of lading and accepted delivery of the freight. Under *Groves*, Brampton is not a consignee despite its designation as such on the bills of lading, and its acceptance of the freight.

The Eleventh Circuit expressly recognized in *Groves* that "The Seventh and Third Circuits reached differing conclusions on this issue [*i.e.*, whether a party becomes a consignee simply by being named as such on a bill of lading and accepting delivery] *resulting in a conflict of authority among the two circuits*." *Groves*, 586 F.3d at 1280 (*citing South Tec*, 337 F.3d at 821) (*and citing Novolog*, 502 F.3d at 262) (emphasis added). The Third Circuit requires the named consignee to provide the notice specified in § 10743(a)(1) to the rail carrier in order to avoid demurrage liability. Conversely, the Eleventh Circuit requires the rail carrier to provide notice to the consignee named on the bill of lading that it has been so identified in order to render the consignee liable for demurrage.

Norfolk requests that this Court exercise its power to resolve the circuit split on this important question, and restore uniformity in interstate commerce. The circuit split has only widened since a petition for certiorari was last presented to this Court. *See* 128 S. Ct. 1240 (denying certiorari in *Novolog*).

B. Brampton's Response Minimizes the Adverse Impact of the Eleventh Circuit's Ruling on the National Freight Rail Network

The sheer amount of demurrage accrued through undue detention of the nation's limited supply of freight rail cars is staggering. In 2008, four of the larger freight railroads in the U.S. collected $432.2 million in demurrage.[10] Brampton claims that Norfolk will simply collect demurrage from some other entity. Brampton muses that the "most likely candidates would be the shippers themselves, with whom Norfolk Southern had contracts and who were responsible for naming [Brampton] as the consignee in the relevant bills of lading." Opp., pp. 13-14. Of course, this proposition ignores several realities. First, delivering carriers like Norfolk typically have no contractual relationship with the shipper if the transportation begins on another rail carrier's line.[11] It is much more likely that Brampton had a contractual relationship with the shipper. Second, the shipper has no control over the rail car and whether demurrage is allowed to accrue by a receiver such as Brampton. Third, the railroad that is merely

[10] This information is reported to the STB by Class I railroads in Annual Report R-1 (line 6 of schedule 210) which are publicly available at http://www.stb.dot.gov/econdata.nsf/f039526076cc0f8e8525660b006870c9?OpenView&Start=1&Count=300&Expand=2#2. Last visited July 7, 2010. The carriers collected the following amounts of demurrage in 2008: Norfolk ($129.1 M); BNSF ($128.3 M); CSX ($68.1 M), and; Union Pacific ($106.5 M).

[11] Such "interline" transportation is the norm given that there are 563 freight railroads in the United States. Pet., p. 10, n. 2.

transporting the goods from origin to destination should not have to be in the middle of a dispute over who is the actual consignee – a determination in which the railroad does not participate and into which the railroad had no transparency.

Brampton disingenuously claims that warehousemen like itself will not allow demurrage to accrue because they are "incentivized to return empty rail cars as quickly as possible to get new cars for unloading." Opp., p. 16. This argument ignores the realities of the marketplace and is betrayed by Brampton's admission that it improperly detained rail cars in this case, thus accruing demurrage. In practice, a warehouseman's purported incentives do nothing to discourage the undue detention of rail cars as such cars often serve as supplemental warehouse facilities.

Under the Eleventh Circuit's decision, named consignees need only deny consenting to be so named (and not comply with the statutory scheme for decertifying itself as consignee) and then hold rail cars with indifference to the consequences. Brampton's arguments that such misuse will not ensue are belied by the existence of cyclical rail car shortages[12] and the uncontroverted facts of this case.

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[12] *See Investigation of Adequacy of Freight Car Ownership*, 323 I.C.C. 48 (1964) ("Car shortages of varying duration and severity have been with us for decades and in every national emergency.")

C. Brampton's Argument Relating to Primary Jurisdiction Fails to Address the Eleventh Circuit's Encroachment Upon the STB's Exclusive Jurisdiction Regarding Interpretation of Tariff Provisions

Norfolk's claim presents a single, straightforward question: is Brampton liable for demurrage under Norfolk's tariff? Amended Complaint, ¶ 8.

The courts below were asked to apply the plain terms of the tariff and determine whether Brampton is liable for demurrage accruing after delivery.[13] Norfolk's tariff provides that "Demurrage charges will be assessed against . . . the consignee at destination."[14] The tariff defines "consignee" as "[t]he party to whom a shipment is consigned or the party entitled to receive the shipment."[15] It is undisputed that Brampton: (1) was the party to whom the consignor consigned the shipment by naming Brampton as the consignee, (2) was the party entitled to receive the shipment, (3) actually accepted the shipment, and (4) did not relieve itself of its obligations as the named consignee by providing the advance, specific, written notice required by the federal statutory scheme.[16] Yet, the Eleventh Circuit held that Brampton is not a consignee, rendering the tariff unenforceable.

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[13] Under common law, the tariff became applicable to Brampton when Brampton accepted delivery of the rail cars. Opp., p. 2.

[14] Tariff, Item 850 (5); *Groves*, 586 F.3d at 1276.

[15] Tariff, Item 200 (6).

[16] *Groves*, 586 F.3d at 1276.

When demurrage is assessed under a tariff, it is subject to STB regulation under 49 U.S.C. § 10702.[17] The STB's jurisdiction is exclusive, rather than primary.[18]

Objections to subject matter jurisdiction based upon an argument that the STB's jurisdiction is exclusive can be raised at any point. *Novolog*, 502 F.3d at 253 (citations omitted).

Brampton dedicates six pages of its brief to a discussion of why the doctrine of *primary* jurisdiction cannot prevent the Eleventh Circuit from issuing its ruling in the decision below. Opp., pp. 17-22. Brampton's brief fails to discuss *exclusive* jurisdiction, which the STB possesses because the demurrage at issue accrued under the terms of a tariff (as opposed to a private

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[17] *PCI Transportation, Inc. v. Fort Worth & Western R.R. Co.*, 2008 STB LEXIS 218, STB Docket No. 42094 (Sub-No. 1), *1 (STB served April 25, 2008) ("*PCI STB*"); *and see Capitol Materials, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Company*, 2004 STB LEXIS 227, STB Docket No. 42068, *3 (STB served April 12, 2004).

[18] 49 U.S.C. § 10501(b); *Illinois Central R.R. v. South Tec Development Warehouse*, No. 97-C-5720, 1999 U.S. Dist. LEXIS 11222,* 4-7 (N.D. Ill. July 16, 1999) (citation omitted); *and see PCI STB*, 2008 STB LEXIS 218, *7, *10-11 (*citing PCI Transp., Inc. v. Fort Worth & Western R.R. Co.*, 418 F.3d 535 (5th Cir. 2005)).

The STB's jurisdiction is primary, not exclusive, when demurrage charges are assessed under a private contract. *See Novolog*, 502 F.3d at 250, 252-53.

agreement between Norfolk and Brampton). When the Eleventh Circuit rejected the definition of consignee provided in the applicable tariff, and fashioned its own novel definition, that court improperly usurped the exclusive (not primary) jurisdiction of the STB and rendered a judgment beyond its authority.

D. The Eleventh Circuit's Decision Imposes an Unclear and Unworkable Rule Upon the Interstate Rail Network

Brampton claims that the Eleventh Circuit's decision is supported by "99 years" of uniform decisional precedent[19] which was only recently rejected by the

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[19] The cases cited by Brampton are similar in that several of the decisions exculpate parties identified as consignees on bills of lading from demurrage liability. However, the reasoning and fact based (and perhaps result driven) holdings are anything but uniform. In *Southern Pacific Transportation Co. v. Matson*, 383 F.Supp. 154 (N.D. Cal. 1974), the court coined the term "connecting carrier-consignee" in order to spare a party that had been identified as consignee on only "a few" of 72 bills of lading from demurrage liability. *Id.*, at 155, 157. In *South Tec*, the court created the concept of "legal consignee" and noted that the defendant had only been named as consignee on 10% or less of the bills of lading. *Id.*, at 821. In *Union Pacific v. Carry Transit, Inc.*, No. 3:04-CV-1095, U.S. Dist. LEXIS 45568 (N.D. Tex. 2005), the court created the nomenclature "actual consignee." *Id.* at *6. In *Western Maryland Ry. Co. v. South African Marine Corp.*, No. 86-CIV-2059, 1987 U.S. Dist. LEXIS 7323 (S.D.N.Y. Aug. 13, 1987), the court noted that "Whether one named as a consignee in a contract thereby becomes liable for demurrage charges . . . is a question which has spawned disparate case law." *Id.* at *8 (citations omitted). Finally, in *CSX v. City of Pensacola*, 936 F.Supp. 880 (N.D. Fla. 1995), the court (Cont'd)

Third Circuit in *Novolog*. Opp., pp. 3-4. Of course, *Novolog* is the most recent opinion from a Circuit Court of Appeals addressing the issue of "who is a consignee" for purposes of demurrage liability. Prior to the Eleventh Circuit's decision, *Novolog* was also the *only* opinion from a Circuit Court which provided a clear and direct answer to that question.

In its holding, the Third Circuit rejected the reasoning and result reached by the authorities relied upon by the Eleventh Circuit for three reasons: (1) there is no reason to define consignee in any way other than its common and statutory manner, namely, as "the person to whom the bill of lading authorized delivery and who accepts that delivery[;]" (2) the *Novolog* rule establishes clear, easily enforceable rules for demurrage liability; and, (3) it is completely within the consignee's power to avoid liability. *Novolog*, 502 F.3d at 257-259. In *Groves*, the Eleventh Circuit acknowledged these three reasons but failed to discuss them. *Groves*, 586 F.3d at 1280-1281.

(Cont'd)

created the concept of "putative consignee." *Id.*, at 884. This is unfortunate because it needlessly muddied the water on this issue as the defendant in *Pensacola* had *not* been named as consignee on *any* bill of lading. *Id.*

The Eleventh Circuit's decision introduced the titles "named consignee," "ultimate consignee," and "consignee for the purposes of demurrage" to the confusing and growing number of permutations of the once straightforward concept of consignee. *Groves*, 586 F.3d at 1275, 1276, 1280, 1281 ("named consignee"); *and id.* at 1276 ("ultimate consignee"); *and id.* at 1280 ("consignee for the purposes of demurrage").

Setting aside the merits of the conflicting approaches taken by the Third and Eleventh Circuits, Brampton incorrectly argues that the Eleventh Circuit's decision does not represent a change in the law. The Eleventh Circuit's decision rejects the well established definition of consignee set forth in tariffs, statutes, and *Novolog*. The Eleventh Circuit's decision resulted in a major sea change regarding the class of entities that can be a consignee, and introduced a new burden of proof.

Brampton claims that the Eleventh Circuit's ruling synchronizes with historical precedent by requiring rail carriers to "sue the consignee, not someone who has been misidentified as such." Opp., p. 25. This flippant dictate, however, completely ignores the rail carrier's perspective. In this case, for instance, if the party who is identified on the bills of lading as consignee and who accepts the freight is not the "actual consignee," then who is? Brampton could not answer these questions and it is the party contracting with the consignor. Opp., p. 5. So how could the railroad, which is simply in the middle of a transaction between the consignor and the named consignee, determine who is? It cannot, which is why the federal statutory scheme does not place that burden on the railroad. Brampton's claim that this ruling, which conflicts with that statutory scheme, provides rail carriers with a "clear" and "workable" rule to determine who is liable for demurrage is simply wrong. Brampton's self-serving position that anyone but it is the party liable for demurrage provides no direction for rail carriers attempting to deliver rail cars in the Eleventh Circuit and comply with their statutory mandate to collect demurrage. *See* 49 U.S.C. § 10746.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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